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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 392.

L. C. COLLINS AND LUCILLE COLLINS, HIS WIFE; EARL SCHNEIDER AND MILDRED SCHNEIDER, HIS WIFE; VOLLIE L. WOODWARD AND LELA E. WOODWARD, HIS WIFE; LEO R. MARLATT AND LEWIS C. MARLATT; *Petitioners*,

vs.

THE CITY OF WICHITA, KANSAS, A MUNICIPAL CORPORATION, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ROBT. B. MORTON,
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and

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THE CITY OF WICHITA, KANSAS, A MUNICIPAL CORPORATION, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

A. STATUTES AND ORDINANCES INVOLVED.

Article XII, Section 5 of the Constitution of the State of Kansas cited in the Petition for Certiorari and set out in Appendix A thereto, is not and has not been involved in this case at any stage of the proceedings.

In addition to the other Kansas Statutes and the Fourteenth Amendment to the Constitution of the United States

cited by petitioners, there is here involved General Statutes of Kansas 1949, 13-1209, which reads:

> "Purchase, construction or extension of waterworks; jurisdiction of city over grounds. That any city of the first class in the state of Kansas shall have full power and authority to purchase, construct or extend waterworks for the purpose of supplying such city and its inhabitants with water, and may maintain, operate and regulate the same, and prescribe the rates at which water shall be furnished; *and any such city may acquire by* purchase or *appropriate proceedings in condemnation all grounds deemed necessary either within or without the city upon which to erect such works, and upon which to lay pipes and mains for the purpose of conveying water to consumers;* and for the purpose of protecting, maintaining and operating such works, any such city shall have the same jurisdiction over any grounds acquired outside of the city for such purposes, as if such grounds were within the city" (Emphasis supplied).

Also material is Ordinance 13-520 of respondent City adopted by its governing body on November 4, 1942, a copy of which is printed in Appendix I, *infra*, page A1.

B. QUESTIONS PRESENTED.

1. Did the Kansas Statutes under which the condemnation was conducted afford due process for appropriation of rights-of-ways outside the City limits?

2. Was the notice of the meeting of the condemnation appraisers given to petitioners by publication ten days in advance of such meeting an adequate fulfillment of the requirements of due process?

3. Does the fact that petitioners filed this action within the thirty day period provided by the Kansas Stat-

utes for an appeal from the condemnation award charge petitioners with actual notice of the proceedings and hence render academic argument as to the efficacy and constitutionality of the constructive notice here given by publication?

4. Is the public purpose of the condemnation destroyed by the fact that water obtained by the respondent City will be conveyed by it through a pipe line in the condemned rights-of-way and thereafter delivered to the Wichita Water Company, a privately owned public utility, under a franchise that obligates the Utility Company to distribute such water to the inhabitants of the City?

5. Was respondent's petition in condemnation in the State Court sufficiently definite and certain?

C. STATEMENT OF THE CASE.

Respondent controverts those portions of petitioners' statement of the case which relate to a condemnation action other than the proceedings here involved. The only proceedings on review are those docketed in the District Court of Sedgwick County, Kansas, as case No. A-51342 (Def. Ex. B; D. C. Rec. 201). All references to a prior condemnation action brought by respondent City docketed in the District Court of Sedgwick County, Kansas, as case No. A-45682 are wholly irrelevant and immaterial.

In refutation to the inference that the prior condemnation proceedings were dismissed by respondent for the purpose of achieving secrecy in conducting these proceedings, it is clearly shown by the record (D. C. Rec. 220) that the prior condemnation action covered lands other than those here involved and that the dismissal of the prior proceedings was entered only because and when the error in the land descriptions was discovered.

Respondent also controverts the statements set out on page 3 of the Petition for Certiorari concerning the alleged circulation and distribution of the newspaper in which the notice was published and shows to this Court that the record of this case is wholly silent as to such matters. The only fact in evidence in that connection is that the paper is one of general circulation in the county where petitioners' lands are located (D. C. Rec. 51).

A condensed version of the facts material to a consideration of the questions here presented is as follows:

On September 7, 1954, the Board of Commissioners of respondent City enacted Ordinance 20-386 (D. C. Rec. 17) declaring the public necessity of acquiring by proceedings in eminent domain described easements and rights-of-way over and through the lands of petitioners and others. The purposes of condemnation and the uses to which the rights-of-way were to be put are stated in the Ordinance as:

> "Laying, installing, maintaining and operating pipes, lines, mains, electrical transmission, control and communication circuits, and other appurtenances necessary for the construction, extension and improvement of the water supply and water works system of the City of Wichita, Kansas, for the purpose of supplying said City and its environs and the inhabitants thereof with water."

The Ordinance further directed the City Attorney to make appropriate application to a Judge of the District Court of Sedgwick County, Kansas, for the appointment of commissioners (appraisers) to appraise the value of the rights-of-way appropriated and to assess the damages resulting to the land owners from such taking. The Ordinance further provided that the cost of the project should be paid from proceeds of general obligation bonds of the City of Wichita authorized to be issued and sold by an affirmative vote of the electorate cast on November 4, 1954.

The lands of petitioners are located beyond the limits of respondent City but within Sedgwick County, Kansas, of which respondent is the County Seat.

Following its adoption, the Ordinance was published in a daily newspaper of general circulation in Sedgwick County, Kansas, on September 8, 1954.

On the day following, respondent filed in the District Court of Sedgwick County, Kansas, its petition in condemnation which was designated as Case A-51342 (Def. Ex. B; D. C. Rec. 201). The aforementioned Ordinance was set out in the petition and it was there further alleged that the acquisition of the described easements and rights-of-way was a public necessity for the public purposes stated in the Ordinance. On the same day, after an examination of the petition and a consideration of the evidence adduced in support thereof, the Sedgwick County District Court found (D. C. Rec. 44) that the allegations of the petition were true; that the City had the power of eminent domain and that the acquisition of the easements and rights-of-way sought to be condemned was necessary to the City's lawful corporate purpose of providing a water supply for its inhabitants. The State Court in the same order appointed three freeholders as condemnation commissioners to assess the damages resulting from the appropriation. The Court further ordered the commissioners to give ten days notice in the official paper of the City of Wichita of the fact of their appointment and of the time and place where they would convene for the assessing and awarding of damages for the taking of the described properties. The Court's order also directed the commissioners to view the premises for the purpose of making such awards.

The required notice was published by the commissioners on September 15, 1954 (D. C. Rec. 50). Contained therein was the style of the condemnation proceedings

and the purposes thereof; a description of the rights-of way sought to be appropriated; the names of the petitioners and other owners of the lands described and a statement that the meeting of the commissioners would be held in City Commission Room 201 of the City Building of Wichita, Kansas, on September 27, 1954, at which time the commissioners would make their awards for the value of the lands taken and the damages resulting to the owners from such appropriation. The commissioners met at the appointed time and on September 28, 1954, filed their report (D. C. Rec. 54) setting forth their awards, in the office of the Register of Deeds of Sedgwick County, Kansas, in the office of the City Clerk of the City of Wichita and in the Sedgwick County District Court condemnation action. The commissioners' report and all proceedings had in the condemnation action were confirmed by the District Court by order entered on September 30, 1954 (D. C. Rec. 83). The title, ownership and right of exclusive possession of the easements and rights-of-way appropriated were thereby declared to be vested in the City of Wichita and the awards to the land owners as deposited in the office of the City Treasurer were declared to be available for payment.

Twenty days thereafter and within the thirty day period provided by General Statutes of Kansas 1949, 26-205, for an appeal from the amount of compensation awarded, petitioners filed the instant action seeking a judgment declaring the condemnation proceedings unconstitutional and void and an injunction permanently restraining respondent City from entering upon their lands.

The Complaint (D. C. Rec. 2) alleged as supporting grounds for requested relief:

> 1. That the notice provisions of the Kansas Condemnation statutes and the notice thereunder given

to appellants were unconstitutional and void for lack of due process.

2. That franchise ordinance 13-520 between the City of Wichita and the Wichita Water Company is illegal and shows that the pipeline rights-of-way condemned were in reality for the private benefit of the Wichita Water Company rather than for an authorized public purpose.

3. That the City's petition in condemnation filed in the State Court action was so lacking in definiteness and certainty that the condemnation proceedings were thereby rendered void.

The franchise ordinance was admitted in evidence (Def. Ex. E; D. C. Rec. 202, *infra*, App. I, p. A1) and its provisions insofar as the same are material to this case are to the effect that respondent City thereby obligates itself to furnish water at a designated place in Sedgwick County, Kansas, to the franchise grantee the Wichita Water Company, a privately owned public utility, and that the latter thereby obligates itself to distribute the water to the City and its inhabitants for domestic, commercial and other uses as well as for the extinguishing of fires.

D. ARGUMENT.

1. The case having been submitted for summary judgment, must be considered in the light of the undisputed facts disclosed by the record evidence. The conclusions set out in the complaint as summarized at pages 11, 12, 13 and 14 of the Petition for Certiorari may not be accepted. The material facts of the controversy simply consist of the State Court condemnation proceedings in case No. A-51342 (Def. Ex. B; D. C. Rec. 201) and the franchise ordinance between respondent City and the

Wichita Water Company (Def. Ex. E; D. C. Rec. 202). Those are in the record in their entirety.

There is no contention that the State Court condemnation proceedings were not conducted exactly as the record evidence discloses; no assertion that the supply and distribution of water to respondent City is not in precise conformity to the terms of the franchise ordinance. That admitted record evidence is thus controlling over the allegations of the complaint.[1]

2. The constitutional right of a landowner to notice and opportunity to be heard in condemnation actions is with respect to the determination of just compensation for the taking but not with respect to the legislative determination of the necessity and expediency of the appropriation. This view has been consistently adhered to by this Court.[2] It has likewise been long settled in Kansas. In *Buckwalter* v. *School District*, 65 Kan. 603, 70 Pac. 605, the Court held:

> "Notice to the citizen of the taking of his property for *public purpose* is of no concern to him for the right to take exists, independently of notice. It is only when compensation for such taking comes to be considered that the owner of the condemned property becomes interested, and only of proceedings to determine that question is he entitled to notice for upon that question only has he a right to be heard" (Emphasis supplied).

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[1] *Engl.* v. *Aetna Life Ins. Co.*, 2 Cir., 139 F. 2d 469, 472:

> "But the history of the development of this procedure shows that it is intended to permit 'a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, depositions, and admissions on file show that there are no genuine issues of fact to be tried.' "

[2] *Bragg* v. *Weaver*, 251 U. S. 57.

The reason for the rule is that if the taking is not for a public purpose or is not authorized, the landowner may prevent an entry upon his lands by an injunctive action, or if an entry has been made, he may obtain relief by the way of ejectment or trespass. He has, in fact, sustained no legal injury until his lands are entered upon by the condemning authority.[3] Hence it must here be determined whether the condemnation by respondent City of rights-of-way for the installation of water pipe lines and other works is for an authorized public purpose.

3. The public purpose and statutory authority in Kansas for municipal appropriation of lands outside city limits for the purpose of installing water mains and other works are found in General Statutes Kansas of 1949, 13-1209, *supra*.

4. General Statutes of Kansas 1949, 26-101, referred to in the petition for certiorari relates only to condemnations *other* than by cities and hence is not here material.

Procedure for condemnations *by cities* is found at G. S. of Kansas 1949, 26-201 to 26-208. Consistent with the rule that landowners are constitutionally entitled to notice concerning the determination of just compensation, Section 26-202 requires that notice shall be given to the landowner concerned by the appraisers of the time and place when and where the damages will be assessed, either by ten days notice in writing *or* by one publication in the official city paper ten days in advance. Where the condemnations are of lands *outside* the city limits, Section 26-208 provides that the procedure prescribed by Sections 26-201 to 26-206 shall be followed insofar as it "shall be applicable."

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[3] *Brewster* v. *Rogers Co.*, 169 N. Y. 73, 62 N. E. 164.

As observed by the Court of Appeals in its opinion in this case:

> "It is our view that with respect to notice Section 26-208 contemplates that when property outside the City is being condemnued, notice must be given in a paper in general circulation in the county in which the property is located."

Such would appear to be the only proper construction of the statute. It can be fairly assumed that the Legislature contemplated that in condemnations outside city limits, the provision of Section 26-202 for publication of the notice in the official city paper might not be applicable; that in such instances, in keeping with the fundamental requirement that notice must be reasonably adapted to the nature of the proceedings, publication should be made in a paper of general circulation in the area or county where the appropriated lands are located.

Such notice was in fact given in this case (D. C. Rec. 51) and was expressly approved by the State Court in its order confirming the proceedings (D. C. Rec. 83). In all other respects the procedure provided by Sections 26-201 to 26-206 is "applicable" to the condemnation here involved.

5. It must next be determined whether constructive notice by publication as provided by the Kansas statute affords due process. This Court has uniformly held that eminent domain proceedings being *in rem* in nature, landowners concerned are not entitled to *personal* notice of the meeting of appraisers for the purpose of fixing damages; that adequate publication notice is sufficient and does constitute due process under the Fourteenth Amendment.[4]

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[4]See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313-14 (1950); *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 283-84 (1925); *Huling* v. *Kaw Valley Railway & Improvement Co.*, 130 U. S. 559 (1889).

6. The remaining question is whether the length of the 10 day notice is sufficient. The essential requirement in that connection is that the notice be reasonably adapted to the nature of the proceedings and afford the property owner a reasonable opportunity to be heard. No case has been found in which a 10 day notice in an *in rem* action has been held lacking in due process. In those instances where the courts have considered publication notices of ten days or less, they have been approved. Three decisions to such effect are:

Pottock v. *Mellott et al.*, 2 Ter. 361, 22 A. 2d 843, a Delaware case, stating that the posting of notice ten days prior to sale of land for taxes was not a denial of due process;

Tilton v. *Decker*, 171 Cal. 731, 154 Pac. 860, holding the Street Opening Act of California provided due process in requiring a ten day publication notice to the landowners affected after an assessment of their damages had been written and filed.

Wynnebago Furniture Mfg. Co. v. *Wisconsin Midland Railroad Company*, 81 Wis. 389, 51 N. W. 576, involved Wisconsin Statutes which provided that a railroad in condemning private lands for its use could give notice of its action by personal service of such notice five days before the hearing in condemnation or by publication notice ten days before the hearing in a paper to be designated by the Court or Judge before whom the hearing was to be held. The Court found that such publication notice to resident and non-resident landowners alike was not a denial of due process of law.

In a very recent decision, *Walker* v. *City of Hutchinson*, 178 Kan. 263, 284 P. 2d 1073 (June 11, 1955), the Kansas Supreme Court upheld the constitutionality of a ten day publication notice given by a city in a condemnation

brought under the same statute involved in this case, General Statutes of Kansas 1949, 26-202.

7. Recognizing that notice and hearing with respect to issue of compensation is the only requirement which must be met, it is of considerable significance that petitioners filed the instant action within the 30 day period allowed by General Statutes of Kansas 1949, 26-205, for an appeal with respect to the amount of compensation awarded. Hence, it follows that the publication notice here given did result in *actual* notice to the petitioners and that thus they have suffered no deprivation of their constitutional right to a timely hearing on the issue of their just compensation.

8. Petitioners challenge the legality of respondent's franchise arrangement whereby the water produced by respondent and conveyed through its pipe lines is distributed to the City and its inhabitants through the instrumentality of the Wichita Water Company, a privately owned public utility. The only aspect of that arrangement material to this case is whether such use by the City of the Water Company as the City's distributing agent destroys the public character of the purpose for which the pipe line rights-of-way in question have been condemned. There is no substantial or meritorious question concerning the point. It has been finally and authoritatively determined in Kansas that the water supply and distribution method employed by the City is in furtherance of a proper and authorized public purpose. The Supreme Court of the State of Kansas has recently so ruled in respect to this very franchise arrangement. The opinion in *State ex rel.* v. *Hedrick*, 178 Kan. 135, 283 P. 2d 437 (May 7, 1955), states that it is apparent from the ordinance that thereby the City obligates itself to furnish water to the utility Company at a designated point, and that the Com-

pany obligates itself to distribute the water to the City and its inhabitants for domestic, commercial and other uses as well as for the extinguishing of fires; that the end result is to supply the City and its inhabitants with water, in itself a legal function under its governmental and police power. The test is whether the principal and paramount purpose is public in character. The courts have consistently held in comparable situations that the public purpose in condemnations is not destroyed by the fact that same incidental benefit will accrue to a private person.[5]

9. While petitioners' contention that the petition in condemnation is lacking in definiteness and certainty does not present a Federal question, there is, nevertheless, no substance to the point. The description of the uses to which the rights-of-way are to be put and the purposes for which they were condemned is expressly stated throughout the condemnation proceedings:

> "for the purpose of laying, installing, maintaining and operating pipes, lines, mains, electric transmission control and communication circuits and other appurtenances necessary for the construction, extension and improvement of the water supply and water works system of the CITY OF WICHITA, KANSAS, for the purpose of supplying said city and its environs and inhabitants thereof with water."

It is submitted that such description with the surrounding circumstances leaves no uncertainty as to the nature of the intended use.

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[5]See decisions cited at 53 A. L. R. 12 in support of the following proposition:

> "The general rule is well settled that the exercise of eminent domain for a public purpose which is primary and paramount will not be defeated by the fact that incidentally a private use or benefit will result which would not of itself warrant the exercise of the power of eminent domain."

10. The decision of the Court of Appeals in upholding the condemnation proceedings is in no manner in conflict with the applicable decisions of this Court nor is it a departure from the accepted and usual course of judicial proceedings. On the contrary the holding is fully consistent with firmly established precedent both in this Court and in the Supreme Court of the State of Kansas.

CONCLUSION.

It is respectfully submitted that the petitioners have advanced no ground or reason to support the issuance of a Writ of Certiorari and it is requested that their petition therefor be denied.

Respectfully submitted,

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Dated: October 7th, 1955.

APPENDIX I.

ORDINANCE 13-520

An Ordinance Granting to the Wichita Water Company, Its Successors and Assigns, the Right and a Franchise to Operate and Maintain a System of Waterworks in the City of Wichita, Kansas, for the Purpose of Supplying and Distributing Water to Said City and Vicinity and Environs and the Inhabitants Thereof, Prescribing the Terms of Said Grant and Relating Thereto.

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF WICHITA, KANSAS:

SECTION 1. That The Wichita Water Company, a corporation, its successors and assigns, be and it is hereby granted the right and a franchise for the purpose of constructing, operating, extending and maintaining and continuing to operate and maintain a system of waterworks in the City of Wichita, Kansas, for the purpose of supplying and distributing water to said City and vicinity and environs and the inhabitants thereof for domestic, commercial, industrial and other uses, as well as for the extinguishment of fires, and subject to the limitations herein stated, said The Wichita Water Company (hereinafter designated as the "Grantee") is granted permission to use such portions of the streets, alleys, avenues, parkways, boulevards and other public grounds of the City of Wichita, as are now used and as may be necessary for the purpose of constructing, operating, extending and maintaining a system of waterworks for the purposes aforesaid.

PROVIDED, that the use of the said streets, alleys, avenues, parkways, boulevards and other public grounds

shall at all times be subject to the right of the City of Wichita under the law to make reasonable rules and regulations relating to the manner of such use and said "grantee" shall never unreasonably interfere with the other proper uses of said streets, alleys, avenues, parkways, boulevards and other public grounds.

SECTION 2. The City of Wichita is hereby given the option of acquiring all of the plant, property and business of Grantee as follows: (1) by purchase, as hereinafter provided, at any time after one year after the effective date of this ordinance, or (2) by condemnation as hereinafter provided, at any time after one year after the effective date of this franchise.

(A) If the City of Wichita shall elect to acquire the property of the Grantee as above provided, by purchase, the following procedure shall govern:

(a) The Board of Commissioners of The City of Wichita shall adopt a resolution conditionally electing to acquire the property of the Grantee, as above described, subject to a favorable vote of the electorate upon the issuance of bonds to pay the cost of such property as is finally determined to be the fair value thereof as is hereinafter set out.

(b) The fair value of the property of the Grantee, as above defined shall be fixed and determined by the majority decision of three disinterested appraisers to be selected as follows:

> One by the said City; one by the Grantee; and the third to be selected by the two thus chosen, or if the two thus chosen fail within five (5) days after their appointment to choose a third, the latter shall, in such event be appointed by the then Chief Justice of the Supreme Court of the State of Kansas. If

Grantee shall fail thus to appoint its appraiser, the said Chief Justice shall do so.

The appraiser to be appointed by the City shall be named within ten (10) days after the effective date of the resolution above provided for. The appraiser to be appointed by the Grantee shall be appointed within five days after written notice by the City to the Grantee of the appointment of its appraiser. No appraisers provided for in this franchise shall be a resident or taxpayer of Sedgwick County, Kansas. All such appraisers shall be competent reputable waterworks engineers.

(c) Said three appraisers, or a majority of them, shall determine the value of said property, plant and business (but not including good will or franchise value), in manner and amount, in elements of value, in good faith and in accordance with the rules of law then obtaining. The property and plant shall include (but without limitation) stand-by equipment and facilities such as duplication of pumps, boilers, and auxiliary equipment, together with all equipment and facilities for the development of water from Grantee's well system and source of supply. There shall be added to the fair value thus ascertained the actual cost of material and supplies on hand and the fair value of all book accounts, and the value of all bills and accounts receivable and water service accrued but not yet billed, as the same existed on the date of said appraisal and the city shall assume all *bona fide* contracts of Grantee for equipment, material and supplies which shall have been made by Grantee prior to the transfer of said property.

(d) Within thirty (30) days after the report is submitted by the appraisers the City shall commence proceedings to submit to the electorate a proposition for the issuance of bonds to provide the funds for the purchase

of the property of the Grantee above provided at the appraised value, plus additions as is herein provided.

(e) In case said bond issue is carried the governing body of the City, by proper ordinance, shall unconditionally elect to take the property of the company, as above provided, within nine months from the date of the election as above provided for, unless litigation results over the proceedings, and the property, appraised as hereinbefore and hereinafter provided, shall be paid for and taken over by the City within a reasonable time after such election and/or the final termination of such litigation, as the case may be.

(f) Before the final taking over of the plant by the City of Wichita, by purchase as is herein provided, the same appraisers, if they are able to act, and if not additional appraisers appointed as is herein provided, shall determine also:

(1) The fair value of any additions and replacements and betterments made since the appraisal and up to the date of the final transfer of the property, less the cost of retirements;

(2) The increase or the decrease as the case may be in the cost of materials and supplies on hand, the fair value of all book accounts, the value of all bills and accounts receivable and the amount of water service accrued but not yet billed, between the time of appraisal and the date of transfer and delivery of the property;

The price previously determined by the appraisers shall be adjusted to reflect the amounts determined under (1) and (2) above.

(g) Proceedings herein shall be governed by the laws then in effect.

(h) The Grantee shall pay its appointed appraiser's fees and expenses. The City of Wichita shall pay its appointed appraiser's fees and expenses. The Grantee and the City shall divide equally the fees and expenses of the third appraiser, together with all incidental expense and costs incurred in making said appraisal.

(i) When the payment for the plant is made, as herein ascertained and provided for, the Grantee shall concurrently deliver to The City of Wichita all of its property as herein provided to be purchased by the City free and clear of all incumbrances, by proper instrument of conveyance. All taxes (whether assessed or not) shall be pro-rated as of the date of said transfer. All net earnings of the property shall accrue and belong to the Grantee until payment of the purchase price by said City. Thereupon all privileges and franchises granted to the Grantee hereunder shall cease and terminate.

(j) In case a bond issue submitted to the electorate for the purchase of the plant of the Wichita Water Company, as is herein provided for, shall not carry, the City shall not be barred from again conditionally electing to exercise its option to purchase under the same procedure as is herein provided for

(k) If, after the City's exercise of said option to purchase, the amount of the fair value of the property purchased should not be paid to the Grantee until after the expiration of the period of this franchise, the City agrees to make adequate provision at that time for the payment of fire hydrant rentals and other charges accruing from the City to Grantee after the expiration of the franchise.

(B) If the City elects to acquire the property of the Grantee by condemnation proceedings, as above provided

for, it may proceed under any law in effect at that time and if the provisions of Section 12-811, 1941 Supplement to General Statutes of Kansas, 1935, or any amendment thereto, be in effect, any commencement of proceedings for condemnation shall be construed as an accelerated expiration under the provisions of the franchise, provided the condemnation proceedings are finally carried through to completion and compensation paid to the Grantee.

SECTION 3. Subject always to the City's aforesaid option to terminate this franchise by purchase or condemnation, as herein provided, and to Section 24 hereof, the term of this grant, contract and franchise shall be for a period of twenty (20) years from and after the taking effect of this ordinance and its acceptance by the Grantee. Provided, however, that if the City shall commence proceedings to acquire the property of the Grantee by condemnation proceedings subsequent to nine years after the effective date of this franchise and prior to ten years after the effective date of this franchise, and prosecute such condemnation proceedings to completion, then in that event this franchise shall be for a period of ten (10) years from and after the taking effect of the ordinance and its acceptance by the Grantee, even though the proposition for a bond issue for the payment of the purchase price is not accepted by the electorate.

SECTION 4. The City, shall during the life of this franchise, deliver to the Grantee, for distribution by it hereunder, an adequate supply of water at all times except when prohibited by unforeseen breaks or other emergencies beyond the City's control, delivering said water into reservoirs or pumping station of the Grantee on Waterworks Island. Provided, however, that in case of temporary discontinuance or inadequacy of the City's said supply of water from any cause, the grantee shall

operate any or all of its then existing wells as may be required to maintain the service. Said water thus to be supplied by the City as well as water supplied by the Grantee from its own sources of supply shall at all times conform in quality with such requirements as may be from time to time established for interstate carriers by the United States Public Health Service. Grantee shall at all times maintain its present well system for emergency use and to augment the supply of water delivered by the City to the Grantee in case of inadequacy.

Commencing with the delivery of said water by the City to the Grantee under this franchise the Grantee will pay to the City $10.00 per million gallons of water for all water so delivered by the City into the reservoir of the Grantee or to its pumping station located on what is known as Waterworks Island. Said water shall be measured by meter or meters owned and maintained by the City. Said meter or meters shall be subject at all reasonable times to inspection and test for accuracy by representatives of said Grantee. If such meter or meters upon test show a variation either fast or slow of greater than two per cent, then and in such case the payment for water delivered by the City shall be adjusted for a period of two months prior to said test, unless within said two months period the meter or meters shall have been tested for accuracy in which case the period covered by the adjustment shall be that which elapsed between the two tests. In the event any meter or meters upon test are found to be not registering, then the amount of water for which payment is to be made shall be estimated, based upon records of the pumpage from Grantee's pumping station. On or before the fifteenth secular day of every calendar month Grantee shall pay the City for water delivered by it to the Grantee during the preceding month.

In addition the Grantee shall pay to the City at the rate of Six Hundred Fifteen Dollars ($615.00) per month commencing with the effective date of this Franchise, said payment to be made on the fifteenth secular day of every calendar month for the preceding month. Said monthly sum of Six Hundred Fifteen Dollars ($615.00) represents the estimated net savings in operating expenses through the distribution of water so supplied by the City as compared with the distribution of water from the Grantee's own facilities. Said sums so paid shall be considered as sums paid for water produced and furnished by the City.

In the event of failure or failures of the City's water supply facilities so as to require the Grantee to operate its own wells for an aggregate of more than fifteen days per annum, then the monthly payments of Six Hundred Fifteen Dollars ($615.00) as aforesaid shall be abated proportionately for the number of days in excess of fifteen that the Grantee is required to operate its wells. Each of the parties hereto pledges its cooperation with the other in carrying forward the operations provided for in this Franchise in such manner as to best promote the public interest.

SECTION 5. All water service shall be by meter measurement, except for extinguishment of fires, and except as herein otherwise provided, which shall be governed by contract between "Grantee" and the consumer, subject to the regulatory jurisdiction of the City, or such other body as may hereafter have jurisdiction over the rules, practices and standards of service of the "Grantee" as may from time to time exist.

SECTION 6. Until such time as they are changed by the Board of Commissioners of the City of Wichita,

or such body or tribunal as shall have jurisdiction thereover, the present regular schedule of meter rates now in effect shall apply and is as follows:

First 25,000 gallons per month or 75,000 gallons per quarter, or any part thereof, 25c per one thousand gallons.

Next 25,000 gallons per month or 75,000 gallons per quarter, or any part thereof, 20c per one thousand gallons.

Next 25,000 gallons per month or 75,000 gallons per quarter, or any part thereof, 15c per one thousand gallons.

Next 25,000 gallons per month or 75,000 gallons per quarter, or any part thereof, 14c per one thousand gallons.

Next 100,000 gallons per month or 300,000 gallons per quarter or any part thereof, 13c per one thousand gallons.

Next 200,000 gallons per month or 600,000 gallons per quarter, or any part thereof, 12c per one thousand gallons.

Next 200,000 gallons per month or 600,000 gallons per quarter, or any part thereof, 10c per one thousand gallons.

Next 200,000 gallons per month or 600,000 gallons per quarter, or any part thereof, 8c per one thousand gallons.

Next 200,000 gallons per month or 600,000 gallons per quarter, or any part thereof 6c per one thousand gallons.

All over 1,000,000 gallons per month or 3,000,000 gallons per quarter, 5c per one thousand gallons.

For consumers classified as residential, metered service shall be subject to a net monthly minimum of Seventy-five Cents (75¢) or quarterly minimum of Two Dollars and Twenty-five Cents ($2.25) for each five-

eighths (5/8) inch meter and for all other classes of consumers the metered service shall be subject to a net monthly minimum of One Dollar ($1.00) or quarterly minimum of Three Dollars ($3.00) for each five-eighths (5/8) inch meter. For all classes of consumers supplied regular service through meters larger than five-eighths (5/8) inch the meter minima shall be as follows:

Size	Rate Per Month	Rate Per Quarter
¾ inch	$ 1.44	$ 4.32
1 "	2.56	7.68
1½ "	5.76	17.28
2 "	10.24	30.72
3 "	23.04	69.12
4 "	40.96	122.88
6 "	92.16	276.48
8 "	163.84	491.52

Flat or assessed rates and off-peak meter rates until otherwise changed, shall be those now being charged. Special contract rates provided for in contracts involving the installation of pipe-lines or facilities, shall remain unchanged and continue in effect in accordance with the terms of said contracts.

SECTION 7. All water bills rendered in accordance with the regular schedule of meter rates set forth in Section 6 hereof, are due and payable when rendered and must be paid at the office of "Grantee" on or before fifteen days thereafter. On all bills so rendered which are paid at the office of the "Grantee" on or before fifteen days after they are rendered, a discount of ten (10) per cent will be allowed:

PROVIDED however, that if such discount shall reduce the amount of the bill below the respective minima

above set forth, then the minimum rate shall be paid, and provided also that no discount shall be allowed on the City's surcharge on minimum accounts.

SECTION 8. The Grantee agrees to add to its own rates and all bills rendered to its consumers, except the City of Wichita and its departments, and to collect for the City (where it may reasonably be done without litigation) upon all amounts collected for itself, until the further ordinances of the City, a surcharge as follows:

(a) To all consumers using water within the City of Wichita and to all industrial consumers as defined by paragraph (a) on page 115 of a book on file in the Water Company's office, entitled "Instructions as to the Use of the Uniform System of Account for Water Utilities Adopted by the National Association of Railroad and Utility Commissioners, including Supplemental Explanation and Additional Subaccounts," fifteen per cent (15%).

(b) To all other consumers, thirty per cent (30%)—calculated on the basis of the regularly established rates in the City of Wichita.

All of the money so collected by the Grantee for the City under the above provisions, during each calendar month, shall be remitted to the City of Wichita on or before the 15th secular day of the following calendar month.

The City shall have the option at any time to change the foregoing surcharges, or any of them, by the enactment of an ordinance and such surcharge or surcharges as is put into effect by such ordinance shall be collected by the Grantee as is herein provided.

If the City should at any time or times, by valid and enforceable ordinance change the foregoing surcharges to

include therein a uniform charge for sewage disposal service, upon bills to water customers whose premises are reported in writing by the City to the Grantee as being connected with public sewers, the Grantee will continue to add and collect the same as hereinbefore provided without cost or expense to the City, always provided that there will be no more than one aggregate percentage surcharge on any consumer's bill.

SECTION 9. The Board of Commissioners of The City of Wichita shall have jurisdiction to fix and determine reasonable rates to be charged for and standards of water service of the "Grantee" and in event the jurisdiction of the said Board of Commissioners of the City of Wichita shall be divested hereafter, then such jurisdiction to fix rates and standards of service shall be from time to time vested in such Court, Board, Commission or other tribunal as may from time to time, be prescribed by law. PROVIDED, HOWEVER, that said Board of Commissioners shall at no time fix or continue a rate which shall prohibit said "Grantee" from earning a reasonable rate upon the fair value of its property used and useful in such public service.

It is further provided, and by the acceptance of this franchise, the "Grantee" agrees that it will not hereafter within the period of two (2) years from the date when this ordinance shall become effective, make application or otherwise seek to have said schedule of rates increased above those specified in this ordinance.

SECTION 10. The Grantee will accept a basic amount of Two Hundred Twenty-Five Thousand Dollars ($225,000.00) per year as the gross income available as a return for its property as it existed December 31, 1941. The amount of $225,000.00 available for a return is defined as the gross operating revenue Grantee receives and retains

from its water customers less operating expenses, maintenance, taxes, and a basic amount for depreciation of Forty-Five Thousand Dollars ($45,000.00) per annum predicated upon the depreciable property as same existed as of December 31, 1941. The Grantee shall be entitled to receive as a return on its property for each year beginning January 1, 1943, the amount of $225,000.00 plus six (6) per cent return and one (1) per cent for depreciation on the cost of all betterments and replacements less the cost of all property abandoned, from and after December 31, 1941, and less six (6) per cent each year on the amount by which the depreciation reserve exceeds the depreciation reserve as shown by the Balance Sheet of the Grantee as of December 31, 1942, it being understood that for the purpose of calculating the balance upon which said six (6) per cent last mentioned is to be computed, no deductions shall be considered from the depreciation reserve, except the cost of all property abandoned and the cost of abandoning such property less its salvage value. If during any calendar year beginning with the calendar year 1943 during the effective period of this franchise, the said gross income of the Grantee is more than $225,000.00 plus six per cent return and one per cent for depreciation on the net cost of betterments and less six per cent (6%) per annum on the increase in the depreciation reserve, as aforesaid, then the Grantee will pay to the City for water delivered to it, in addition to $10.00 per million gallons, an amount equal to one-half of such difference, such additional payment to the City for water to be paid annually within one hundred twenty (120) days after December thirty-first of each calendar year.

The Grantee shall make a report annually to the City on or before April 1st of each year, commencing April 1, 1944, showing for the previous calendar year gross rev-

enues and operating expenses, maintenance, taxes and accruing depreciation in accordance with the classification of accounts used by the Grantee. The Grantee shall also concurrently furnish the City with a statement showing the cost of all betterments and replacements and the cost of all property abandoned from and after December 31, 1941, together with the increase or decrease, as the case may be, in the depreciation reserve from and after December 31, 1942.

The Grantee agrees that the aggregate management charges paid by it under the present or any similar management contract for present or similar services rendered or to be rendered Grantee by any other party or agency and charged as an operating expense of the Grantee, shall not exceed the percentage paid by other water companies in the same affiliated group under similar contracts and shall at no time exceed four per cent (4%) of the gross operating revenues of the Grantee for any calendar year.

SECTION 11. That all public fire hydrants shall be used exclusively for the extinguishment of fires, necessary drill and practice of Fire Department and the flushing of city streets, sewers and gutters; but all use of fire hydrants in the City of Wichita shall be under the direction and control of the Chief of the Fire Department, provided that this provision shall not be construed to authorize the use of water from said hydrants by private sprinkling concerns, except at such reasonable charges therefor and under such reasonable regulations as may be prescribed; and provided further, that this provision shall not be construed to forbid any proper use of the fire hydrants by the Grantee.

SECTION 12. During the term of this franchise the Grantee shall furnish free from fire hydrants to the City

of Wichita, all the water that the City may require for flushing of sewers, gutters and streets, and other reasonable public uses, except for fire protection; but this provision shall not be construed to apply to the commercial use of water for sprinkling of streets.

The rate for all municipal uses, including parks and playgrounds, and except as herein specified shall not exceed 5c per thousand gallons, subject to this minima herein elsewhere stated.

SECTION 13. That in consideration for the benefit that will accrue to the City of Wichita (including the furnishing of water for fire protection) by the operation, maintenance and extension of said system of waterworks, the City agrees to rent and hereby does rent from the said Grantee, its successors and assigns, for and during the term of this franchise, all fire hydrants which were in service at the effective date of Ordinance No. 7744, at an annual rental of Thirty-Seven and 50/100 Dollars ($37.50) each, payable monthly in advance on the first day of each and every month with six per cent interest after due.

That the City shall also rent, from the time of their installation until the expiration or termination of this franchise, or the acquisition of said waterworks by the City of Wichita, any additional fire hydrants which were placed after the effective date of Ordinance No. 7744 or which shall be placed during the existence of this franchise, at the rate of Seven and 50/100 Dollars ($7.50) each per annum. All such additional hydrant rentals shall be paid monthly and in manner as provided in Section 13 of this ordinance.

Provided that when new hydrants are placed upon mains existing at the time of the effective date of this

franchise, the City shall pay the actual cost of such installation, exclusive of the costs of said hydrant and hydrant branches.

SECTION 14. That said Grantee, its successors and assigns, shall extend its water mains of six inch inside diameter or larger to any part of the City of Wichita when ordered to do so by Resolution of the Board of Commissioners. PROVIDED, however, that as to water mains extended by order of the Board of Commissioners since the effective date of Ordinance No. 7744, or extended by order of the Board of Commissioners under this franchise, the City shall pay to the Grantee as annual rental, which rental shall be at the rate of one cent (1c) per "inch-foot" (being one cent per inch inside diameter per lineal foot of pipe) of extension so ordered; PROVIDED FURTHER, that the City shall have the right to order the Grantee to install fire hydrants on extensions ordered hereunder at whatever points the City shall choose, and the Grantee shall install such hydrants at its own cost, when so ordered by the City, and the City shall pay the Grantee, in addition to the rental provided in this section, the rate of Seven and 50/100 Dollars ($7.50) per annum for each hydrant so installed. Such rentals shall be paid in the same manner as provided by the terms of Section 13 hereof for hydrant rentals.

All fire hydrants now installed or which may hereafter be installed by order of the City, shall be considered permanent as to location.

The Grantee shall make extensions of at least seventy-five (75) feet of two (2) inch main for each *bona fide* consumer who shall apply for such extension when adequate service can be furnished through a two (2) inch main.

SECTION 15. All water services, up to two inches (2") in diameter, hereafter installed or renewed, shall

be of extra strong lead pipe or of seamless extra pure copper tubing of not less than sixteen gauge thickness, and cast iron pipe for all services two (2) inches and over in diameter. All joints in all leadwater services between the main and the curb line along the line of the main may be of the lead flange type. PROVIDED, however, that during the war emergency and for such time thereafter as the various materials prescribed and called for hereinabove shall be unobtainable for the purpose of maintaining water service by said Grantee, it shall be lawful and permissible for substitution of said water service materials to be made.

SECTION 16. The Grantee shall furnish, install, replace and maintain, at its own expense, to the curb lines along the line of its mains, all new water services, except special fire services.

Said "Grantee" shall also maintain to the curb line, all services located along its mains, at its own expense, which have heretofore been installed and running into property abutting its mains. PROVIDED, however, that before said "Grantee" shall be required to maintain such services previously and heretofore installed, the owners of each such service shall assign and convey by proper instrument to said "Grantee" the title to said services.

The initial cost of repairing any such service, together with the cost of replacing same, shall be added to the capital account of the Grantee, but nothing other shall be added to such capital account because of the conveyances of such services; and provided further, that in the event of the acquisition of the waterworks system by the City of Wichita hereafter by any means whatsoever, the value of such services, except as above specified, shall not be considered or taken into account in the determination of the value of the properties of the said Grantee.

SECTION 17. That the Grantee shall furnish, install and maintain, at its own expense, all meters used for measuring service to consumers, except those for special fire service, which shall be governed by reasonable rules and regulations to be determined by the tribunal having jurisdiction thereover.

SECTION 18. As compensation to the City of Wichita for granting this franchise, the said Grantee, its successors and assigns, shall pay to the City of Wichita one per cent of the gross receipts derived from the service permitted by this franchise from consumers, located in Wichita and territory immediately adjoining said City but not within the boundaries of any incorporated city or cities except Wichita, said Grantee to make and report to the Board of Commissioners all such gross receipts, once in each six months period and shall pay into the treasury of the City the amount due said City at the time such report is made. If said report be found to be erroneous or the statement thereof incorrect, then payment shall immediately be made upon the corrected statement.

SECTION 19. All water mains and services shall be laid with not less than thirty (30) inches of cover.

SECTION 20. The Grantee shall keep complete books and records pertaining to its business and operation, and the representatives of the City of Wichita shall, at all times, have free access thereto. When requested by the City, the Grantee shall have all or any part, of its said books and records available for inspection and examination by the representatives of said City, at the offices of said Company, in the City of Wichita, Kansas. And in event the use of any or all of such books or records shall be required for use in legal proceedings between the City and the Grantee at any place, the said Grantee shall produce such books and records at the request of said City.

SECTION 21. The grounds of said Grantee and particularly "Waterworks Island," during the term of this grant shall at all times be kept in a neat condition and said "Waterworks Island" may, at the option of, and as directed by the Board of Park Commissioners, be landscaped and beautified as said Board of Park Commissioners of the City of Wichita may direct. Such landscaping and care of grounds may be done and supervised by the Board of Park Commissioners and the cost thereof shall be paid by Grantee as an operating expense. PROVIDED that such landscaping and beautifying shall in no manner interfere with the use of said property for waterworks purposes and that said cost shall not exceed $1,000.00 per year.

SECTION 22. The City of Wichita may pass such ordinances as may be reasonably necesary for the protection of the property of the Grantee and providing for the enforcement thereof by suitable penalties.

SECTION 23. The Grantee may establish, from time to time, such suitable rules and regulations for the conduct of its business and relating to its service, as may from time to time be expedient and necessary, subject, however, to the power of the Board of Commissioners of the City of Wichita to revise or modify the same in a reasonable manner.

SECTION 24. In event of the failure of the Grantee, its successors and assigns, to comply with any and all provisions of this ordinance and franchise or should the Grantee do or cause any act or thing to be done which is prohibited by this franchise, then and in either event the City of Wichita shall have the option to declare this contract and franchise to be forfeited and thereafter the same shall be null and void. PROVIDED, the right of forfeiture shall not be exercised until after Grantee shall have been duly notified in writing by the City of the reasons for the

proposed forfeiture and given a reasonable opportunity to comply with the conditions of the franchise and provided further that in all matters not affecting the public health and safety, it shall be deemed a sufficient compliance if the Grantee shall, within a period not exceeding thirty days, begin the actual work necessary to comply with this ordinance and prosecute the work diligently to completion.

The Grantee shall not be responsible for failure to perform hereunder or subject to the forfeiture of this contract and franchise, due to the breakdown or injury of its waterworks facilities, acts of God or the Public Enemy, impossibility of law or reasons beyond its control, including, but without limitation, unusual demands upon its facilities, and curtailment of its service, on account of war conditions or regulations.

SECTION 25. This ordinance shall be read in full at three regular weekly meetings of the Board of Commissioners and immediately after its final passage shall be published in the official City paper once each week for three (3) consecutive weeks, and if no legal petition shall be filed asking for an election, as provided by Chapter 135, Laws of Kansas, 1941, it shall become effective and be in force after the expiration of sixty (60) days from the date of said final passage and after its due acceptance in writing by said Grantee.

PROVIDED, HOWEVER, that if an election be demanded by the filing of a petition, as provided by law, during the time intervening between its final passage and the expiration of sixty (60) days aforesaid, then the ordinance shall not become effective until after an election shall have been held and said ordinance approved, as provided by the terms of said Chapter 135, Laws of Kansas, 1941.

SECTION 26. That within sixty (60) days after the final passage of this ordinance the Grantee shall file with the City Clerk of the City of Wichita its acceptance in writing of the provisions, terms and conditions of this ordinance, which acceptance shall be duly acknowledged before some officer authorized by law to administer oaths.

This ordinance was duly passed by the Board of Commissioners after a third reading thereof at a third weekly meeting of the Board of Commissioners of the City of Wichita, being finally passed and adopted upon the 2nd day of November, 1942.

/s/ O. F. Sullivan,
Mayor.

Attest:

/s/ C. C. Ellis,
City Clerk.

(Seal)